



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Environmental & Land Case 377 of 2012**

**JOHN KIBERA NJOROGE... ..PLAINTIFF**

**VS**

**GEORGE GICHUHI KAMATA.....1ST DEFENDANTS**

**HENNA KAMATA.....2ND DEFENDANTS**

**RULING**

John Kibera Njoroge the plaintiff / applicant has filed suit against the defendants, George Gichuhi Kamata the 1st defendant and Henna Kamata 2nd defendant. Simultaneously with the plaint the plaintiff filed a chamber summons dated the 26/6/12. The application is brought under Order 40 rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Prayers 1 and 2 of the application are spent.

The applicant is seeking prayers No 3 that pending the hearing and final determination of this suit a temporary injunction be issued restraining the defendant/their servants and / or agents restraining them from taking away, using selling or in any other manner whatsoever dealing with parcels of land known as Dagoretti/Riruta/5818 and Dagoretti/Riruta/5819 goods and or equipment in and about the premises erected therein. The applicant is also seeking costs of the application.

The application is also premised on grounds (a) to (h) which are set out on the face of the application. To support his application the plaintiff /applicant filed a supporting affidavit dated 26/6/2012 together with a further affidavit dated the 3/10/12.

The plaintiff's case is as follows the 1st and 2<sup>nd</sup> defendants have leased to him parcels of land known as Dagoretti/Riruta/5818 and Dagoretti/Riruta/5819. The lease period for the 2 suit properties were to expire in the year 2026 and 2021 respectively. He runs a business on the leased premises and he has built some buildings for purposes of running the business. He has also paid affront rent to the defendants for many years in advance as required in the lease agreements. That it was never agreed that the lessor in either of the agreements and put up a house in respective plots or use titles of the plots to secure loans during the subsistence of the lease period. That the 2nd defendant is in a clear breach of the lease agreement built on residential house in the leased land despite his efforts to stop him. The 1st defendant has also secured a loan from Equity Bank using plot No 5818. That he has for purposes of defining boundaries and security fenced his leased land but the 1st defendant has always interfered with the same by putting everything down. The 2nd defendant on the other hand has transferred the management of plot No 5819 to the 1st defendant. His concern is that the 2nd defendant is likely to interfere with his peace enjoyment of the plot. He is apprehensive that the 1st defendant's actions will bring down his business located on plot No 5818 and any default in paying the loan secured by plot No 5819 will put his business into risk as the lender could execute its power of sale under the charge, hence the orders sought.

The 1st defendant depones as follows in his replying affidavit that the plaintiff has leased L. R. Dagoretti/Riruta/5819 from his mother the 2nd defendant. That the defendants that he has never entered into a formal lease with the plaintiff for his plot No Dagoretti/Riruta/5818. That there has been dispute over Dagoretti/Riruta/4707 and during the existence of the said disputes the plaintiff used to give him money to pay the lawyer and for other expenses. The plaintiff during the said dispute used to pay rent to the 2nd defendant. That the money given to him by the plaintiff was a loan and the same wasn't meant to be an advance payment of rent (GK 2). That in 2009 the plaintiff advanced him money to finish construction he was undertaking in the plot allocated to him. That the document purported to be a lease agreement between him and the plaintiff was meant to be an acknowledgement of the money received from the plaintiff and not a lease agreement. That the document he signed had already been drawn by the plaintiff when he went to the advocate's office and was not drawn by the advocate.

That the plaintiff did not allow him to read the document but threatened him that if he did not sign he would demand payment of all the invoices he had advanced him with interest yet he did not have the money then. That at no time did he agree to lease the property to the plaintiff for 15 years or for any term at all but the plaintiff has resided on the premises due to the debt he owes him. That the leased agreement is not genuine as it purports that he leased to the plaintiff half an acre yet his entitlement was a quarter of an acre. That when the money was loaned to him by the plaintiff could not complete the construction, he took a loan of Kshs. 100,000/- from Equity Bank which was guaranteed by the plaintiff's son on the plaintiff's advise. That thereafter he has subsequently taken a loan of 800,000/= to complete construction of the house. That the plaintiff was not happy with this.

In the 2nd defendants replying affidavit she avers that she is the registered owner of Dagoretti/Riruta/5819 on behalf of her son Martin Karanja Kamata. That she first rented to the plaintiff a portion of land parcel No Dagoretti/Riruta/36 In 1995. The said land was subdivided and she rented to the plaintiff half of the land. The lease ended and they couldn't renew it as there was a family dispute. The plaintiff however continued to pay her monthly rent of 3500/=. After the dispute her portion of land became Darogetti/Riruta/4704. That the said portion of land had a dispute between her and her son the 1st defendant. The dispute was heard and LR 4704 was subdivided. That during the period of the dispute she was the one receiving rent from the plaintiff and at no time did she enter into a formal lease with the plaintiff to lease to him Dagoretti/Riruta/4704, neither was she holding the said land on behalf of the 1st defendant rent nor did he have authority to enter into a formal lease with the plaintiff. That after the dispute ended in 2009 parcel No 4704 was divided into 3 portions Dagoretti/Riruta/5817, 5818 and 5819. 5818 belongs to 1st defendant and 5819 is hers. That in 2010 she requested the plaintiff to release back to her the portion of land she had leased to him so that she could construct rental houses. She did not have money so she approached the plaintiff to lend her. The plaintiff loaned her Kshs 261,000/=. That since she did not have money to reply him they entered into a formal lease agreement for the remaining portion of the plot 5819. The agreement was not for the entire plot as she had constructed on portion of the plot with the full knowledge and participation of the plaintiff. That she has no problem in the plaintiff remaining in that portion of the land but the rent should be increased to Kshs 13000/= per month. That the lease agreement was obtained through threats by the plaintiff and that the plaintiff dictated the length of time the lease was to be in effect and the rent payable. That she is an old lady who does not know how to read and write and the lease was not explained to her and now that it has been read to her she thinks it's oppressive. That it is not true that she transferred the management of the plot 1<sup>st</sup> defendant as she is the one who receives rent from tenants and she is in control of the management of the plots. She has also finished construction as agreed and would lease the plot. That the boundaries were agreed and she has not encroached on the leased portion.

In the plaintiffs further affidavit which is a response to the 1<sup>st</sup> defendants replying affidavit, he avers that the respondents averments that they were just borrowing money to develop their parcels of land and that the same was not to form part of the rent is baseless for the only relationship they have is that of landlords and tenant thus there was no any other purpose or consideration would have been due save payment of rent. That the 2<sup>nd</sup> defendants claim for an increment of rent from Kshs 3500/= to Kshs 13000/= amount is unjustified. That from the houses that he constructed for her she collects over Kshs 25000/= which she would not have achieved by accumulating the rent and he pays. That the 1<sup>st</sup> defendant's claim that he is unable to repay the loan borrowed from Equity Bank is unjust and an attempt to frustrate his lease

tenure. That he is ready to repay the loan for him subject to the said repayments being made part of the future rent. That the lease was read and explained to them by the advocate who prepared and attested them and the respondents averments on the lease agreement are lies.

Parties filed written submission which I have carefully read and considered together with the affidavits filed. In the plaintiffs submissions he reiterates what is deponed in his affidavits and submits that the 1<sup>st</sup> defendant has breached the lease in existence by constructing on the portion of the rented suit property. That the plaintiff is in occupation as a tenant not because of a debt owed to him by the 1<sup>st</sup> defendant and the plaintiff has paid rent for the pending duration in the lease agreement. That the plaintiff is willing to repay the loan that the 1<sup>st</sup> defendant borrowed from Equity if he is unable to pay and in doing so the defendants would not lose their land. That if the defendants are opposed to this proposal then their main aim is to terminate or frustrate, interfere and or deny the plaintiff his peaceful enjoyment of the leased property and the court should grant the orders sought. That the plaintiff has established a prima facie case with a probability of success and is likely to suffer irreparable injury which cannot be compensated by an award of damages. That the plaintiff runs a business in the leased suit property which is his livelihood and there is a likelihood that the said business will have to be closed down in case of a default in repaying the loan secured by land and the bank will exercise its statutory power of sale. The plaintiff relied on the case of **“Focus Motorcycle Manufacturing Company Ltd –vs- Anne Mumbi Hinga and Another (2007) eKLR.**

The defendant in their submissions submits that the claim that its trite law that the Court does not act in vacuum and the Courts have held so in **HCCC No 3019 of 1996 (Milimani) Munyu Industries (K) Ltd -Vs- The Liquidation Agent Pan Africa Credit Finance & another.**

Counsel submitted that if the injunction is granted then there would be nothing left pending for the Court to litigate. That the acts complained of and which the plaintiff seeks to restrain the defendants from doing have already happened. That the houses have been constructed and the loan has been secured on parcel No 5818. All this happened with the knowledge and help of the plaintiff, that the Court does not act in vain and cannot restrain the happening of an act that has already happened.

The defendant also submitted that legality of the leases allegedly entered into between the plaintiff and the defendants are highly suspect and raise more questions than they can answer and explain why they think so. The defendants further submitted that the purported lease agreements are subject to the Landlord and Tenant (Shops hotels and catering Establishments) Act cap 301 as they are controlled under Section.2 of the Act being a controlled tenancy . The defendants referred the Court to clause 3 of the lease dated March 2011 which states that the parties may determine the tenure of the first lease and in the event the plaintiff terminates it he will not receive the rent paid. That the purported lease dated 22/7/2009 at clause 3 provides for termination of the same before expiry of the period of 5 years and that this places the suit premises under the jurisdiction of the Business Premises Rent Tribunal. Lastly that the plaintiff has not met the threshold established in the case of **Geilla Vs Cassman Brown.**

I have set out the facts as deponed in this ruling which clearly state each party’s case. The plaintiff seeks an injunctive order. As clearly stated the plaintiffs case must fall within the threshold of the case of **Geilla Vs Cassman Brown.** Does the plaintiff have a prima facie case?. The plaintiff claims he is a tenant of the defendants parcels No 5818 and 5819. The 1st defendant denies the plaintiff is his tenant, the 2nd defendant admit the plaintiff is a tenant but only to the extent of the portion she gave him. The plaintiff relies on the lease agreements annexed marked “JKN1”. The defendants have denied these leases and each claim that they signed them under duress and that the court should not rely on them. The plaintiff is not the owner of the 2 plots. The plots belong to the defendants respectively. Should I really inject the defendants as alleged? In the orders sought and the plaintiff seek a temporary injunction against the defendant their servants and agents from taking away using, selling or in any other manner dealing with the said parcels, goods and equipment in and about the premises erected.

I have carefully perused the lease agreements. The 1st ones dated 1/3/2011 it’s between the 2nd defendant and the plaintiff over parcel No 5819. At paragraph 1 it is stated that the defendant is the over parcel No 5819. At paragraph 1 it is stated that the defendant is the owner and is holding the land for her son

David Gichuhi Kamata . A fact both defendants deny. The 2nd lease is over parcel No 4704. It's dated 22/7/2009. 4704 as correctly submitted is not the subject of the application before me. The 2nd defendant admits that this parcel of land was subdivided and became 3 portions .

From the facts there appears to be same tenant/landlord relationship between the plaintiff and 2nd defendant but not the 1st defendant. It appears too that the parties have had this relationship for same time and the relationship between the plaintiff and 2nd defendant has resulted to the plaintiff having a premise in the parcel of land occupied by the 2nd defendant. The plaintiff feels threatened by what has been happening with the construction and loan taken by the 2nd defendant. Can really bar the defendant from dealing with their property in the the manner sought by the plaintiff?. In my view I find I cannot as the lease agreement that has been exhibited by the plaintiff has been challenged by defendants. The issue of the validity can only be determined at a full hearing. I therefore find that granting the injunction as sought would be granting an order in vain.

The plaintiff has therefore failed to establish a prima facie case with a probability of success. He can be easily compensated for any loss he will suffer if it is established that there was a tenancy agreement that has been breached. The balance of convenience tilts in favor of the defendants. I therefore decline to grant the orders sought. Costs shall be in the cause.

Dated, signed and delivered this 15th Day of March 2013.

**R. OUGO  
JUDGE**

In the Presence of:-

..... Plaintiff/Applicant

.....1<sup>st</sup> & 2nd Defendants/Respondents

.....Court Clerk